

Nº. 49164-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

ROBERT REED,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Cowlitz County,
Cause No. 14-1-00679-6
The Honorable Michael Evans, Presiding Judge

Reed Speir
WSBA No. 36270
Attorney for Appellant
3800 Bridgeport Way W., Ste. A #23
(253) 722-9767

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	
1. Was it ineffective assistance of counsel for Mr. Reed's trial counsel to fail to lay the proper foundation introduce testimony that J.R. told Kizzy Woodard that J.R.'s mother's boyfriend molested J.R.?	1
2. Was Mr. Reed deprived of the ability to present a full defense to the charges against him by his trial counsel's failure to ensure that evidence that J.R. claimed to have been molested by his mother's boyfriend previously would be admitted?	1
3. Did the prosecutor commit prosecutorial misconduct by vouching for the credibility of J.R. based facts not in evidence during closing argument?.....	1
4. Was it ineffective assistance of counsel for Mr. Reed's trial counsel to fail to object to the improper closing argument of the State?	1
5. Did cumulative error deprive Mr. Reed of a fair trial where Mr. Reed's trial counsel failed to ensure that impeachment evidence critical to his defense was admitted and failed to object to improper closing argument by the State?	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT	
1. Mr. Reed's right to a fair trial was violated by	

ineffective assistance of counsel and prosecutorial misconduct.	23
<i>a. Mr. Reed had a right to effective assistance of counsel.....</i>	23
<i>b. It was ineffective assistance of counsel to fail to conduct proper questioning of J.R. that would allow the introduction of J.R.'s statement to Ms. Woodard that one of Ms. Crippen's former boyfriends molested him .</i>	25
<i>c. The prosecutor committed misconduct by vouching for J.R.'s credibility in closing argument based on facts not in evidence.</i>	30
<i>d. It was ineffective assistance of Mr. Reed's trial counsel to fail to object tot he prosecutor's closing argument.</i>	33
2. Cumulative error deprived Mr. Reed of a fair trial. .	34
E. CONCLUSION	35

TABLE OF AUTHORITIES

Page

Table of Cases

Federal Cases

<i>Alford v. United States</i> , 282 U.S. 687, 51 S.Ct. 218, 219, 75 L.Ed.624 (1931).....	25
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).....	25
<i>Dows v. Wood</i> , 211 F.3d 480, <i>cert. denied</i> 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000).....	23
<i>Maryland v. Craig</i> , 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).....	26
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	25

Washington Cases

<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	24
<i>In re Pers. Restraint of Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	30
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121 (1996).....	31
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	26
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003)	30
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	31
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	31

<i>State v. Foster</i> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	26
<i>State v. Gerdtz</i> , 136 Wn. App. 720, 150 P.3d 627 (2007)	33
<i>State v. Gibson</i> , 75 Wn.2d 174, 449 P.2d 692 (1969)	30
<i>State v. Glenn</i> , 86 Wn.App. 40, 935 P.2d 679 (1997), <i>review denied</i> 134 Wn.2d 1003 (1998)	24
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010).	31
<i>State v. Johnston</i> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	34
<i>State v. Lewis</i> , 156 Wn. App. 230, 233 P.3d 891 (2010).....	31
<i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002), <i>cert. denied</i> , 126 S.Ct. 2294, 164 L.Ed. 820 (2006)	24
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662, <i>review denied</i> , 113 Wn.2d 1002 (1989)	33
<i>State v. Roberts</i> , 25 Wn.App. 830, 611 P.2d 1297 (1980).....	26, 27
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994), <i>cert. denied</i> 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).....	30
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	28
<i>State v. Sakellis</i> , 164 Wn. App. 170, 269 P.3d 1029 (2011).....	31
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008), <i>cert. denied</i> , 556 U.S. 1192 (2009)	32
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006), <i>cert. denied</i> , 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007) ...	35

Other Authorities

Article 1, § 22 of the Washington Constitution	23, 25
--	--------

U.S. Const., 6 th Amendment	23, 25
RCW 9A.44.120	28

A. ASSIGNMENTS OF ERROR

1. Mr. Reed received ineffective assistance of counsel that violated his right to present a full defense to the charges against him.
2. Ineffective assistance of counsel deprived Mr. Reed of a fair trial where his trial counsel failed to object to improper closing argument by the prosecution.
3. Prosecutorial misconduct deprived Mr. Reed of a fair trial.
4. Cumulative error deprived Mr. Reed of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it ineffective assistance of counsel for Mr. Reed's trial counsel to fail to lay the proper foundation introduce testimony that J.R. told Kizzy Woodard that J.R.'s mother's boyfriend did bad things to J.R.? (Assignment of Error No. 1)
2. Was Mr. Reed deprived of the ability to present a full defense to the charges against him by his trial counsel's failure to ensure that evidence that J.R. claimed to have been molested by his mother's boyfriend previously would be admitted? (Assignment of Error No. 1)
3. Did the prosecutor commit prosecutorial misconduct by vouching for the credibility of J.R. based facts not in evidence during closing argument? (Assignments of Error Nos. 2 & 3).
4. Was it ineffective assistance of counsel for Mr. Reed's trial counsel to fail to object to the improper closing argument of the State? (Assignments of Error Nos. 2 & 3).
5. Did cumulative error deprive Mr. Reed of a fair trial where Mr. Reed's trial counsel failed to ensure that impeachment evidence critical to his defense was admitted and failed to object to improper closing argument by the State?

(Assignments of Error Nos. 1, 2, 3, & 4).

C. STATEMENT OF THE CASE

Factual and Procedural Background

From 1997 to 2003, Robert Reed was married to Michelle Crippen.¹ Ms. Crippen has since remarried and took the surname of her new husband.² The couple had two children together, J.R. and M.R.³ M.R. was born in 2000 and J.R. was born in 2001.⁴ Mr. Reed had a son named Richard Reed from a previous relationship.⁵

After the divorce, Mr. Reed had no contact with the children until 2013.⁶ Mr. Reed provided child support and the children were covered by his insurance.⁷

After the divorce Ms. Crippen lived with Brent Robbins for a time in St. Helens, Oregon, and she also lived with a man named Joe in Pasco.⁸ Ms. Crippen moved with J.R. and his sister to the Tri-Cities area in August of 2010.⁹ J.R. had meltdowns while he was living with Ms. Crippen and Joe in the Tri-Cities area.¹⁰ J.R. sometimes threw things that hit Ms.

¹ RP 218, 267-268.

² RP 267.

³ RP 219, 268. The children will be referred to by their initials.

⁴ RP 268.

⁵ RP 297-298.

⁶ RP 269.

⁷ RP 269.

⁸ RP 243, 287-289.

⁹ RP 273.

¹⁰ RP 244.

Crippen.¹¹ J.R. would get so aggressive that Ms. Crippen would have to straddle him and pin him to the floor until he calmed down.¹² Brent Robbins was a big guy and when Ms. Crippen lived with Mr. Robbins he would spank J.R.¹³

Ms. Crippen's mother, Jeanette Gilson, helped raise the children.¹⁴ In April 2013 Ms. Crippen and her children moved in with her mother, Ms. Gilson.¹⁵ J.R. was several years behind his age in development, such that when he was ten years old his behavior was more like a seven year old.¹⁶ J.R. had many problems going to the bathroom and would wet the bed.¹⁷ J.R. also had anger issues and learning problems.¹⁸ J.R. would get really mad, throw things, break things, "run crazy around", break things, and "go wild for a while" until he would sit down and calm down.¹⁹ J.R. hit Ms. Gilson and threw things at her when he lived in the Tri-Cities area.²⁰ J.R. was wild for years and Ms. Gilson would hit J.R. all the times when he hit her.²¹ When J.R. was nine or ten years old he had an episode where he took the phone for the house, was throwing and breaking things,

¹¹ RP 289.

¹² RP 291.

¹³ RP 292.

¹⁴ RP 218-220.

¹⁵ RP 273-274.

¹⁶ RP 224.

¹⁷ RP 254.

¹⁸ RP 220.

¹⁹ RP 221.

²⁰ RP 245.

²¹ RP 248-249.

and would not calm down.²² After several hours, Ms. Gilson was able to get J.R. to sit in a chair where she tied him up loosely with a jump rope.²³ J.R. believed he was tied up because he remained in the chair for 10-15 minutes and calmed down.²⁴

The next day J.R. locked himself in the bathroom, plugged all the drains, turned on the water and flooded the bathroom.²⁵ Ms. Crippen tried to get J.R. to come out but he refused.²⁶ J.R. had an electric toothbrush, hairdryer, and curling iron in the bathroom so Ms. Gilson called Ms. Crippen and told her that she was going to call 911.²⁷ Ms. Crippen told Ms. Gilson to go ahead and call the police, so Ms. Gilson did.²⁸

The police and Ms. Crippen arrived at Ms. Gilson's home about the same time.²⁹ J.R. refused to talk to the police or open the bathroom door, so the police officer kicked open the door, grabbed J.R., carried J.R. to a bedroom and sat and held J.R. and tried to talk to him.³⁰ The officer told Ms. Crippen and Ms. Gilson that they needed to get help with J.R. so they put J.R. in the patrol car and took him to the emergency room.³¹

²² RP 222.

²³ RP 223.

²⁴ RP 223.

²⁵ RP 225.

²⁶ RP 225.

²⁷ RP 225.

²⁸ RP 225.

²⁹ RP 225.

³⁰ RP 225-226.

³¹ RP 226.

From the emergency room J.R. was transferred to Kootenai Hospital Behavioral Center.³²

At Kootenai Hospital, J.R. was diagnosed as having autism.³³ Once J.R. was diagnosed, he was prescribed medication and a social worker was contacted in order to get J.R. into a facility for care.³⁴ J.R. stayed at a group home before eventually returning to Ms. Gilson's home.³⁵ Ms. Gilson assisted J.R. in taking his medication.³⁶ The medicine did not resolve J.R.'s issues.³⁷ Even after getting on medication J.R. still has "meltdowns."³⁸ The medication helped reduce the intensity of J.R.'s "meltdowns" but he still got upset, stomped, slammed doors, and swore.³⁹

J.R.'s incidents were often triggered by change.⁴⁰ Because of this, Ms. Crippen keeps J.R. on a strict daily schedule.⁴¹

A side effect of J.R.'s medication is that J.R. wants more food and is hungry all the time.⁴² After starting the medication, J.R. had a weight

³² RP 226, 270.

³³ RP 220, 226

³⁴ RP 226-227, 228.

³⁵ RP 227.

³⁶ RP 228.

³⁷ RP 271.

³⁸ RP 258.

³⁹ RP 228-229.

⁴⁰ RP 272.

⁴¹ RP 272.

⁴² RP 233-234.

problem and his life revolved around his meal schedule and snack time.⁴³ Because of this, Ms. Crippen did not allow J.R. to eat junk food, soda, or sugar.⁴⁴

Mr. Reed began visiting with J.R. in the summer of 2013.⁴⁵ In August of 2013, Ms. Crippen got a job requiring her to move back to the Tri-Cities area.⁴⁶ J.R. liked his teacher and was doing well in his school in the Castle Rock area⁴⁷ so it was decided that Ms. Crippen and M.R. would move to the Tri-Cities and J.R. would remain with Ms. Gilson and continue to visit Mr. Reed.⁴⁸ J.R. began visiting with Mr. Reed at Mr. Reed's house in Longview in the late summer of 2013 and continued visiting once the school year started.⁴⁹ In August of 2013 J.R. began occasionally spending the night with Mr. Reed.⁵⁰

In the fall of 2013 J.R. was 12 years old.⁵¹ In October of 2013, J.R. had an incident at school that resulted in his being suspended.⁵² On October 7, 2013, the students in J.R.'s class were lining up to get on the bus at the end of the school day and J.R. ran up and was being too loud

⁴³ RP 234, 261.

⁴⁴ RP 233-234.

⁴⁵ RP 230, 275.

⁴⁶ RP 230-231.

⁴⁷ RP 218, 231.

⁴⁸ RP 231-232.

⁴⁹ RP 232-233.

⁵⁰ RP 277.

⁵¹ RP 152, 269.

⁵² RP 234, 280.

and was running and his teacher told J.R. to go back.⁵³ J.R. became agitated and he pushed his teacher and some students and went straight to his bus.⁵⁴ J.R. was written up and suspended for one day.⁵⁵

Ms. Gilson went to the school to talk with the principal but J.R. was being very disrespectful, would not calm down, and would not talk to Ms. Gilson or the principal unless he was bent over a chair with his pants pulled down.⁵⁶ J.R. ended up “slamming out of the office.”⁵⁷

As punishment for J.R.’s disrespectful behavior, Ms. Gilson told J.R. to rake the leaves in her back yard.⁵⁸ J.R. refused to rake the yard and after several hours of arguing Ms. Gilson told J.R. that he either had to follow her rules or he would have to go live with Mr. Reed.⁵⁹ J.R. was getting wild and mad and hit Ms. Gilson with pieces of cardboard.⁶⁰ After J.R. hit Ms. Gilson with the cardboard she called Mr. Reed and had him come pick J.R. up.⁶¹ J.R. went to live with Mr. Reed.⁶² Ms. Crippen was living in Pasco at this time.⁶³

⁵³ RP 323.

⁵⁴ RP 323.

⁵⁵ RP 323.

⁵⁶ RP 235.

⁵⁷ RP 235.

⁵⁸ RP 153, 236.

⁵⁹ RP 153, 236.

⁶⁰ RP 237.

⁶¹ RP 237.

⁶² RP 153, 280.

⁶³ RP 288.

J.R. lived with Mr. Reed in October and November of 2013.⁶⁴

During this time Mr. Reed never contacted Ms. Gilson in any way.⁶⁵

On November 7, 2013, J.R. was with his class in P.E. when he began humping the gym mats.⁶⁶ J.R. was brought back to his classroom to cool down but he said something to another student and made her cry.⁶⁷

J.R.'s teacher, Shawna Driscoll, called J.R. to her desk to have him copy sentences about the rule he had broken while the teacher called Mr.

Reed.⁶⁸ Ms. Driscoll told Mr. Reed that she preferred J.R. to complete the school day and asked Mr. Reed to give J.R. a pep talk.⁶⁹ Mr. Reed agreed to speak to J.R. but J.R. initially refused to come to the phone.⁷⁰

Eventually, J.R. reluctantly agreed to come to the phone but was still agitated.⁷¹ Once J.R. got to the phone he began wrapping the cord around his neck saying he wanted to kill himself.⁷² J.R. was agitated and yelling but Ms. Driscoll was able to get the telephone cord off of J.R.'s neck before J.R. ran out of the classroom with Ms. Driscoll's assistant following him.⁷³ Ms. Driscoll had other students to watch so she stayed in

⁶⁴ RP 238.

⁶⁵ RP 238.

⁶⁶ RP 323-324.

⁶⁷ RP 324.

⁶⁸ RP 324-325.

⁶⁹ RP 325.

⁷⁰ RP 325.

⁷¹ RP 325-326.

⁷² RP 326.

⁷³ RP 326.

the classroom and told Mr. Reed what had happened and that he needed to come pick J.R. up.⁷⁴

J.R. ran outside of the school and rolled down a hill and got muddy.⁷⁵ After school ended Mr. Reed arrived to pick up J.R.'s things from his locker.⁷⁶

Ms. Driscoll thought Mr. Reed was an engaged and personable parent who was interested in what J.R. was doing but he told Ms. Driscoll that he had never been a parent and felt uncertain about what to do.⁷⁷

Ms. Kizzie Woodard was Mr. Reed's neighbor in Longview.⁷⁸ Ms. Woodard took care of J.R. every weekday in the mornings after Mr. Reed left for work.⁷⁹ Ms. Woodard would wake J.R. up, make him breakfast, give him his medicine, and make sure he got on the bus for school.⁸⁰ J.R. seemed happy to be in the apartment with Mr. Reed.⁸¹ Mr. Reed told Ms. Woodard that J.R. had been molested by one of Ms. Crippen's former boyfriends.⁸² J.R. did not like living with Ms. Crippen and Ms. Gilson and hated going there.⁸³ J.R. also told Ms. Woodard that he had been molested

⁷⁴ RP 326-327.

⁷⁵ RP 327.

⁷⁶ RP 327.

⁷⁷ RP 333.

⁷⁸ RP 441.

⁷⁹ RP 445.

⁸⁰ RP 445.

⁸¹ RP 449.

⁸² RP 452.

⁸³ RP 455.

by one of Ms. Crippen's boyfriends.⁸⁴

Ms. Gilson was not aware of J.R. ever threatening to harm himself or kill himself or strangle himself with a phone cord.⁸⁵ Ms. Crippen also was not aware of any incident where J.R. threatened to hang himself or strangle himself with a phone cord.⁸⁶

Right after Thanksgiving, J.R. came to spend the weekend with Ms. Gilson.⁸⁷ J.R. told Ms. Gilson that he needed to talk to Ms. Gilson but he couldn't because Mr. Reed would be mad and because J.R. wasn't supposed to tell Ms. Gilson anything.⁸⁸ J.R. told Ms. Gilson that "his dad touched his thing and made [J.R.] touch [Mr. Reed's]."⁸⁹ Ms. Gilson asked J.R. if it happened more than once and J.R. said it happened "lots of times."⁹⁰ Ms. Gilson and J.R. told Ms. Crippen what J.R. had told Ms. Gilson then Ms. Gilson took J.R. to get a haircut while Ms. Crippen called the police.⁹¹

On December 13, 2013, Ms. Kristen Mendez performed a forensic interview of J.R. at the Children's Justice and Advocacy Center in Kelso.⁹²

⁸⁴ RP 457.

⁸⁵ RP 258.

⁸⁶ RP 295.

⁸⁷ RP 238.

⁸⁸ RP 239.

⁸⁹ RP 239, 160.

⁹⁰ RP 239, 160.

⁹¹ RP 240, 282-283.

⁹² RP 202.

Det. Todd McDaniel was present at the interview.⁹³ Det. McDaniel was in an adjacent room with a one-way mirror.⁹⁴ During the interview J.R. talked about someone's "thingy."⁹⁵ Ms. Mendez had J.R. draw a picture of the "thingie" and J.R. drew a picture of a penis.⁹⁶ Towards the end of the interview, J.R. told Ms. Mendez that he had spoken with someone like her before when there was an allegation of physical abuse.⁹⁷

On December 19, 2013, Det. McDaniel interviewed Mr. Reed at Mr. Reed's apartment.⁹⁸ Mr. Reed told Detective McDaniel that J.R. had been doing weird things.⁹⁹ Mr. Reed then agreed to meet with Det. McDaniel later that day at the Sheriff's Office.¹⁰⁰

When Mr. Reed met Det. McDaniel at the Sheriff's Office on the afternoon of December 19, 2013, Det. McDaniel read Mr. Reed his constitutional rights, told Mr. Reed what J.R. had said in the forensic interview, informed Mr. Reed about the allegations made by J.R. that Mr. Reed had molested him, and began questioning Mr. Reed.¹⁰¹ Mr. Reed told Det. McDaniel that J.R. would put his face in Mr. Reed's crotch and

⁹³ RP 212, 337.

⁹⁴ RP 337.

⁹⁵ RP 212, 337.

⁹⁶ RP 212, 337.

⁹⁷ RP 215.

⁹⁸ RP 338, 515-516.

⁹⁹ RP 339.

¹⁰⁰ RP 339.

¹⁰¹ RP 339-340, 515-516.

would look at Mr. Reed when Mr. Reed was in the shower.¹⁰² Mr. Reed also said that when he and J.R. were watching television J.R. would put his face in Mr. Reed's crotch.¹⁰³ Mr. Reed said that when he was sleeping J.R. would jump on Mr. Reed's bed and wake him up by humping him.¹⁰⁴ Mr. Reed also said that when J.R. was mad he would pull his pants down and expose his penis and J.R. would pat Mr. Reed on the rear end when Mr. Reed was cooking.¹⁰⁵

Mr. Reed told Det. McDaniel that he asked J.R. if anyone had ever touched J.R.'s private parts and J.R. said no.¹⁰⁶ Mr. Reed told Det. McDaniel that he started asking people what he should do about J.R.'s behavior but Det. McDaniel did not ask Mr. Reed who he had talked to about J.R.'s behavior.¹⁰⁷ Det. McDaniel did not investigate if anyone else had ever touched J.R. inappropriately, including Ms. Crippen's prior boyfriends.¹⁰⁸ Det. McDaniel also never spoke to J.R.¹⁰⁹

Mr. Reed stated that J.R. had a rash on his scrotum so Mr. Reed lifted J.R.'s scrotum, looked at the rash, and then made J.R. take a

¹⁰² RP 340.

¹⁰³ RP 341.

¹⁰⁴ RP 342, 519.

¹⁰⁵ RP 342.

¹⁰⁶ RP 343.

¹⁰⁷ RP 343, 352.

¹⁰⁸ RP 351, 359.

¹⁰⁹ RP 351.

shower.¹¹⁰ Mr. Reed denied that he and J.R. took showers together and said that he and J.R. had to shower with the door open because it would cause mold if they did not.¹¹¹ Mr. Reed told Det. McDaniel that he believed that Ms. Gilson had put J.R. up to making the allegations.¹¹² Mr. Reed denied touching J.R. sexually or putting J.R.'s penis in his mouth.¹¹³

Mr. Reed told Det. McDaniel that there was a younger couple that lived in the same apartment complex as he and J.R. and that J.R. saw the couple kissing and touching and asked Mr. Reed what the couple had been doing.¹¹⁴ Mr. Reed said that J.R. asked if the boy was going to pee on the girl and make a baby.¹¹⁵ Mr. Reed said he tried to explain how babies were made to J.R. and went online and showed J.R. a picture of a penis and a vagina but J.R. never understood.¹¹⁶

Mr. Reed also told Det. McDaniel that J.R. had bit, pinched, and kicked him many times.¹¹⁷

On January 7, 2014 Det. McDaniel spoke with the principal at J.R.'s school and also spoke with Ms. Driscoll.¹¹⁸

On January 13, 2014, 6-8 weeks after he had been removed from

¹¹⁰ RP 344, 522.

¹¹¹ RP 344, 523-524, 527.

¹¹² RP 345.

¹¹³ RP 346, 527-528.

¹¹⁴ RP 347, 528-529.

¹¹⁵ RP 347, 528-529.

¹¹⁶ RP 347-348, 528-529.

¹¹⁷ RP 349.

¹¹⁸ RP 349.

Mr. Reed's home, J.R. told Ms. Gilson that Mr. Reed had shaved him "down there" in the "private area."¹¹⁹ Ms. Gilson looked and it appeared that J.R. had been shaved and pubic hair was starting to grow back.¹²⁰ On January 14, 2014, Ms. Gilson called Detective McDaniel and told him about J.R.'s apparently shaved pubic region.¹²¹ Ms. Gilson also told Det. McDaniel that he should talk to Mr. Reed's other son, Richard Reed.¹²²

On June 6, 2014, Mr. Reed was charged with one count of rape of a child in the first degree and child molestation in the first degree.¹²³

On October 27, 2014, the charges against Mr. Reed were amended to one count of rape of a child in the second degree and one count of child molestation in the second degree.¹²⁴

Mr. Reed's trial began on April 13, 2016.¹²⁵ On the morning of trial, the State moved to amend the charges against Mr. Reed to change the charging period of the crimes charged.¹²⁶

At trial, J.R. testified that Mr. Reed did ask him if anyone had ever touched J.R.¹²⁷ J.R. testified that he wanted to live with Mr. Reed in the fall of 2013 because Mr. Reed would buy J.R. candy and other things like

¹¹⁹ RP 240, 263-264.

¹²⁰ RP 240-241.

¹²¹ RP 241, 350.

¹²² RP 241.

¹²³ CP 1-2.

¹²⁴ CP 5-6.

¹²⁵ RP 137.

¹²⁶ RP 56-57.

¹²⁷ RP 142.

expensive shoes and J.R. was never allowed to eat candy at Ms. Gilson's house.¹²⁸

J.R. testified that he would wet his bed so Mr. Reed would sleep in J.R.'s bed until 11 o'clock when he would wake J.R. up and then go to his own bed.¹²⁹ J.R. also testified that sometimes Mr. Reed would sleep in J.R.'s bed the whole night.¹³⁰

J.R. told the jury that one evening he and Mr. Reed were watching TV when Mr. Reed told J.R. to go take a shower.¹³¹ J.R. testified that he told Mr. Reed that he had just taken a shower and Mr. Reed responded by telling J.R. to pull down his pants and then smelled J.R.'s genitals after J.R. pulled his pants down.¹³² J.R. stated that Mr. Reed licked J.R.'s penis, played with it, put it in his mouth and sucked on it until it got hard.¹³³

J.R. then testified that Mr. Reed pulled his pants down and told J.R. to suck his penis.¹³⁴ J.R. testified that he sucked Mr. Reed's penis because Mr. Reed told him that he would never see his mother, sister, or grandma again if he told about it.¹³⁵ J.R. told the jury that he sucked Mr.

¹²⁸ RP 144.

¹²⁹ RP 146.

¹³⁰ RP 146.

¹³¹ RP 147.

¹³² RP 148.

¹³³ RP 148.

¹³⁴ RP 148.

¹³⁵ RP 149.

Reed's penis and it got hard and slimy whitish stuff came out of it and went in J.R.'s mouth.¹³⁶ J.R. testified that this happened again the next time he went to Mr. Reed's house.¹³⁷ J.R. told the jury that Mr. Reed again told J.R. not to tell or he would never see his mother, sister, or grandmother again.¹³⁸ J.R. testified that Mr. Reed would do this every weekend after he went to live with Mr. Reed.¹³⁹

J.R. told the jury that three or four times Mr. Reed came in the bathroom when J.R. was in the shower and washed J.R.'s penis with soap and his hands.¹⁴⁰ J.R. also testified that Mr. Reed shaved his pubic hair with an electric razor.¹⁴¹ J.R. testified that he bit Mr. Reed one time while Mr. Reed was molesting him.¹⁴²

J.R. denied ever humping a mat at school, putting his face in Mr. Reed's crotch without Mr. Reed telling him to do it, touching Mr. Reed on the butt, or coming out of the bathroom with his privates exposed.¹⁴³

J.R. testified that the abuse occurred before he moved in with Mr. Reed but he thought that the abuse would stop.¹⁴⁴

¹³⁶ RP 149.

¹³⁷ RP 150.

¹³⁸ RP 150.

¹³⁹ RP 153.

¹⁴⁰ RP 154-155.

¹⁴¹ RP 156.

¹⁴² RP 156-157.

¹⁴³ RP 173.

¹⁴⁴ RP 181.

Mr. Reed also testified at his trial.¹⁴⁵ Mr. Reed testified that the first time J.R. spent the night at Mr. Reed's home, J.R. put his face in Mr. Reed's lap while Mr. Reed was watching TV.¹⁴⁶ Mr. Reed testified that he was shock, asked J.R. "What the F are you doing?" and J.R. "shook and freaked and left the room."¹⁴⁷ Mr. Reed testified that the following Sunday Mr. Reed was asleep in his room when J.R. came into Mr. Reed's bedroom, told him to get up, pulled the covers off Mr. Reed when he didn't wake up, then jumped on Mr. Reed and started humping him.¹⁴⁸ Mr. Reed made J.R. leave the room and then got up thinking that something was seriously wrong.¹⁴⁹ Mr. Reed testified that he was concerned about J.R.'s behavior so the next time he picked J.R. up he asked J.R. if Brent Robbins had touched J.R. in his private parts and J.R. said no.¹⁵⁰ Mr. Reed testified that there were no further incidents until J.R. moved in with Mr. Reed in October.¹⁵¹

Mr. Reed testified that he and J.R. had difficulty getting along and that J.R. acted out all the time.¹⁵² J.R. always wanted to eat and if Mr.

¹⁴⁵ RP 462-557.

¹⁴⁶ RP 476.

¹⁴⁷ RP 476-477.

¹⁴⁸ RP 477-478.

¹⁴⁹ RP 478.

¹⁵⁰ RP 480.

¹⁵¹ RP 484-485.

¹⁵² RP 492.

Reed did not let him eat J.R. would get extremely mad at Mr. Reed.¹⁵³

When J.R. got mad at Mr. Reed he would pull his pants down and threaten to urinate on Mr. Reed.¹⁵⁴ Mr. Reed would respond angrily and ask J.R. what he was doing.¹⁵⁵ Mr. Reed confirmed that for the first couple weeks he lived with Mr. Reed J.R. would wet the bed.¹⁵⁶ J.R. stopped wetting the bed only when Mr. Reed threatened to buy J.R. diapers.¹⁵⁷ After the first few weeks Mr. Reed would wake J.R. up at midnight and make him go to the bathroom and that stopped the bed-wetting problem.¹⁵⁸

Mr. Reed testified that during the month of October J.R. would watch when Mr. Reed took a shower and that J.R. opened the shower curtain three times while Mr. Reed was showering.¹⁵⁹ Mr. Reed testified that he spoke to numerous people about how to handle J.R., including Kizzy Woodard.¹⁶⁰

Mr. Reed told the jury that J.R. was always having tantrums and always wanted Mr. Reed to take him places and buy him things.¹⁶¹ Mr. Reed ended up taking an extra day of work per week just to afford all of

¹⁵³ RP 492.

¹⁵⁴ RP 493.

¹⁵⁵ RP 493.

¹⁵⁶ RP 500-501.

¹⁵⁷ RP 500-501.

¹⁵⁸ RP 501.

¹⁵⁹ RP 497.

¹⁶⁰ RP 498.

¹⁶¹ RP 499.

J.R.'s demands.¹⁶² Mr. Reed worked Saturdays and while he was working he either left J.R. with Teresa Reed, Mr. Reed's ex-wife, or Richard Reed, J.R.'s half-brother and Mr. Reed's other son, would watch J.R.¹⁶³ Richard Reed is 12 years older than J.R.¹⁶⁴

One time when Richard Reed was watching J.R., J.R. tried to stick his penis in Richard Reed's face after J.R. had gone to the bathroom.¹⁶⁵ Richard Reed told J.R. that that wasn't something normal people do and sent J.R. to his room.¹⁶⁶ Richard Reed went to J.R.'s room and scolded J.R. about putting his penis in Richard's face and J.R. looked at Richard with a look like he didn't realize the repercussions of what he had done and didn't realize why Richard was so mad at him.¹⁶⁷ J.R. began punching the walls in his bedroom, throwing and breaking things, freaking out, crying, and saying he didn't know what he did wrong.¹⁶⁸

From the time J.R. began living with Mr. Reed, J.R. wanted a phone.¹⁶⁹ M.R. had gotten a new iPhone and J.R. was very jealous.¹⁷⁰ Mr. Reed refused to get J.R. a phone because Mr. Reed believed J.R. was not

¹⁶² RP 499-500.

¹⁶³ RP 388-389, 394-395, 397-398.

¹⁶⁴ RP 389, 394-395.

¹⁶⁵ RP 401-402.

¹⁶⁶ RP 402.

¹⁶⁷ RP 402.

¹⁶⁸ RP 402-403.

¹⁶⁹ RP 508.

¹⁷⁰ RP 508.

responsible enough to have one.¹⁷¹ Ms. Crippen promised to get J.R. a phone in November but never did.¹⁷² The day after Ms. Crippen had promised to bring J.R. the phone but failed to do so J.R. had a “total meltdown.”¹⁷³ J.R. punch and kicked Mr. Reed, threatened to kill Mr. Reed with a knife, hit and spit on Mr. Reed, swear “like a sailor” at Mr. Reed, and did not calm down until Mr. Reed threatened to call 911.¹⁷⁴

The next day J.R. was wild at school and had an attitude to the point that J.R.’s teacher called Mr. Reed in the afternoon.¹⁷⁵ J.R. eventually calmed down, but two days later had another meltdown.¹⁷⁶ Mr. Reed came home from work to find that J.R. was eating everything in the house.¹⁷⁷ When Mr. Reed confronted J.R. about it, J.R. started having a meltdown.¹⁷⁸ Mr. Reed told J.R. that he was not going to have another meltdown and J.R. needed to settle down and J.R. responded by grabbing a fork and putting it to his head, saying, “I want to die; please kill me.”¹⁷⁹ Mr. Reed was able to deescalate the situation.¹⁸⁰ Two days later Mr. Reed took J.R. to Thanksgiving dinner at Hometown Buffet in Vancouver and

¹⁷¹ RP 509.

¹⁷² RP 509.

¹⁷³ RP 509-510.

¹⁷⁴ RP 509-510.

¹⁷⁵ RP 511.

¹⁷⁶ RP 511.

¹⁷⁷ RP 511.

¹⁷⁸ RP 512.

¹⁷⁹ RP 512.

¹⁸⁰ RP 512.

J.R. enjoyed it.¹⁸¹

The day after Thanksgiving dinner, Ms. Crippen came to pick up J.R. and J.R. did not want to go with her.¹⁸² For 45 minutes J.R. refused to go with Ms. Crippen, relenting only when Ms. Crippen told him that if he did not go with her he would not get Christmas presents from her and from Ms. Gilson.¹⁸³ J.R. was very angry and did not want to go with Ms. Crippen, but he did.¹⁸⁴

Two hours after picking J.R. up, Ms. Crippen came back and got all of J.R.'s things and said J.R. was going to spend a couple days with Ms. Gilson.¹⁸⁵

The following Monday and Tuesday J.R.'s school called Mr. Reed looking for J.R.¹⁸⁶ The following Thursday Mr. Reed called Ms. Crippen and told her to bring J.R. to his home or to school.¹⁸⁷ The next thing that happened was Mr. Reed was contacted by Det. McDaniel.¹⁸⁸

At trial, Mr. Reed denied shaving J.R.'s pubic hair.¹⁸⁹ Mr. Reed testified that he told Kizzie Woodard that he thought one of Ms. Crippen's

¹⁸¹ RP 506, 512.

¹⁸² RP 512.

¹⁸³ RP 512-513.

¹⁸⁴ RP 513.

¹⁸⁵ RP 513-514.

¹⁸⁶ RP 514-515.

¹⁸⁷ RP 515.

¹⁸⁸ RP 515.

¹⁸⁹ RP 542.

boyfriends had done something to J.R.¹⁹⁰

Prior to Ms. Woodard testifying, the State objected to Ms. Woodard testifying that J.R. had told her he had been molested by one of Ms. Crippen's prior boyfriends.¹⁹¹ The State argued that J.R.'s statement offered through Ms. Woodard would be hearsay unless it was offered as impeachment of J.R. as a prior inconsistent statement under ER 613.¹⁹² The State further argued that J.R.'s statement was not admissible under ER 613 to impeach J.R. because trial counsel for Mr. Reed had failed to give J.R. the opportunity to explain or deny the statement during cross-examination as is required by ER 613.¹⁹³ Mr. Reed's trial counsel's response was that he could not remember what he asked J.R.¹⁹⁴ The trial court granted the State's motion and ruled that Mr. Reed's statement to Ms. Woodard that J.R. had been molested by one of Ms. Crippen's boyfriends was admissible, but J.R.'s admission to Ms. Woodard that he had been molested was not admissible.¹⁹⁵

The jury found Mr. Reed guilty of rape of a child in the second degree and child molestation in the second degree.¹⁹⁶

¹⁹⁰ RP 542.

¹⁹¹ RP 433-435.

¹⁹² RP 433-435.

¹⁹³ RP 433-435.

¹⁹⁴ RP 435-436.

¹⁹⁵ RP 436-438.

¹⁹⁶ CP 88-89; RP 629.

Notice of appeal was filed on June 23, 2016.¹⁹⁷

D. ARGUMENT

1. Mr. Reed’s right to a fair trial was violated by ineffective assistance of counsel and prosecutorial misconduct.

a. Mr. Reed had a right to effective assistance of counsel.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial.¹⁹⁸

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice.¹⁹⁹

To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of

¹⁹⁷ CP 119-135.

¹⁹⁸ *Dows v. Wood*, 211 F.3d 480, *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing* *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

¹⁹⁹ *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *cert. denied*, 126 S.Ct. 2294, 164 L.Ed. 820 (2006) (*citing* *State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)).

reasonableness.²⁰⁰

To establish that counsel's performance was deficient, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. King*, 130 Wn.2d 517, 531, 925 P.2d 606 (1996) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). To establish that the deficient performance prejudiced the defense, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial." *King*, 130 Wn.2d at 531, 925 P.2d 606 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). **A defendant is denied his right to a fair trial when the result has been rendered unreliable by a breakdown in the adversary process.** *King*, 130 Wn.2d at 531, 925 P.2d 606.²⁰¹

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.²⁰² If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.²⁰³

The remedy for ineffective assistance of counsel is remand for a new trial.²⁰⁴

²⁰⁰ *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

²⁰¹ *State v. Glenn*, 86 Wn.App. 40, 45, 935 P.2d 679 (1997), review denied 134 Wn.2d 1003 (1998) (emphasis added).

²⁰² *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689).

²⁰³ *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

²⁰⁴ *See In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

- b. *It was ineffective assistance of counsel to fail to conduct proper questioning of J.R. that would allow the introduction of J.R.'s statement to Ms. Woodard that one of Ms. Crippen's former boyfriends molested him.*

A criminal defendant has a constitutional right to present a defense.²⁰⁵ Both the United States and Washington Constitutions guarantee an accused the right to confront prosecution witnesses.²⁰⁶

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings...means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.²⁰⁷

"Cross-examination of a witness is a matter of right...Its permissible purposes, among others, are...that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased."²⁰⁸ The central concern of the Sixth Amendment's Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an

²⁰⁵ *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

²⁰⁶ U.S. Const. amend. VI; Washington Const. art. I, § 22.

²⁰⁷ *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

²⁰⁸ *Alford v. United States*, 282 U.S. 687, 691-692, 51 S.Ct. 218, 219, 75 L.Ed.624 (1931). (Citations omitted).

adversary proceeding before the trier of fact.”²⁰⁹

The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses.²¹⁰ The denial of a criminal defendant's right to adequately cross-examine an essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation, made applicable to the states by the Fourteenth Amendment.²¹¹

“[T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.”²¹² “Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny.”²¹³

In the prosecution of sex crimes, the right of cross-examination often determines the outcome. In such cases, the credibility of the accuser is of great importance, essential to prosecution and defense alike.

It is fundamental that a defendant charged with commission of a crime should be given great latitude in

²⁰⁹ *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

²¹⁰ *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998).

²¹¹ *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980), *citing Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

²¹² *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

²¹³ *Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297.

the cross-examination of prosecution witnesses to show motive or credibility. . . . This is especially so in the prosecutions of sex crimes where, owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness' testimony.

...

Here, it is undisputed that the defendant and Ms. A engaged in sexual intercourse. The only controverted issue is whether, as Roberts contends, the act was by mutual consent or, as Ms. A and the two other girls testified, under compulsion by the threat of a knife. **Credibility therefore was a key, if not determinative factor.**²¹⁴

There was no evidence independent of J.R. that any criminal activity occurred in this case. There was no physical evidence suggesting any crimes occurred and all other witnesses were simply repeating what J.R. had claimed what happened. As in *Roberts*, **J.R.'s credibility therefore was a key, if not determinative factor.** Mr. Reed's trial counsel should have taken every opportunity to investigate J.R.'s credibility and present evidence that would impeach J.R., lessen his credibility, or otherwise weaken the State's case.

In any child sex abuse case one of the questions the jury will ask is how the child would have knowledge of the sexual conduct if the abuse

²¹⁴ *Roberts*, 25 Wn. App. at 835.

did not occur.²¹⁵ Indeed, a child victim's "precocious knowledge" of sexual activity is recognized as corroborating evidence that a trial court may consider in determining whether there are sufficient indicia of reliability to admit child statements under RCW 9A.44.120.²¹⁶

It was not objectively reasonable nor could it be considered a legitimate trial tactic for Mr. Reed's trial counsel to fail to ask J.R. the simple question of whether he had ever told Ms. Woodard that one of Ms. Crippen's prior boyfriend's had molested him. By failing to ask that one question, trial counsel for Mr. Reed made J.R.'s statement to Ms. Woodard that he had been abused by one of his mother's prior boyfriends inadmissible. Had this statement been admitted, the jury would have been given an alternative basis for J.R.'s knowledge about fellatio and ejaculation.

²¹⁵ It is well settled that a child's 'precocious knowledge' of sexual activity is corroborative evidence of sexual abuse. *See, e.g., State v. Swan*, 114 Wn.2d 613, 633, 790 P.2d 610 (1990) (in reviewing indicia of reliability for child hearsay statement, three-year-old's accurate description of fellatio and ejaculation corroborated her claims of abuse).

²¹⁶ RCW 9A.44.120 provides, in pertinent part.

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another...not otherwise admissible by statute or court rule, is admissible in...criminal proceedings...in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Mr. Reed and Ms. Woodard did testify that Mr. Reed told Ms. Woodard that J.R. had been molested by one of Ms. Crippen's prior boyfriends.²¹⁷ However, the jury could dismiss this testimony as nothing more than Mr. Reed creating a cover story to avoid suspicion. The introduction of testimony that J.R. himself had told Ms. Woodard that he had previously been molested would have greatly strengthened Mr. Reed's defense and weakened the State's case, not in small part because the introduction of this evidence would have done much to reduce J.R.'s credibility.

Given the central nature of J.R.'s credibility to the State's case and the highly beneficial nature of the testimony, it was ineffective assistance of counsel for Mr. Reed's trial counsel to fail to ask the questions required to have this evidence introduced. The failure of Mr. Reed's trial counsel to secure the introduction of this evidence resulted in Mr. Reed being unable to fully cross-examine J.R. to determine his credibility and to introduce relevant evidence that would assist the jury in determining his credibility. This was a breakdown in the adversary process that deprived Mr. Reed of a fair trial and violated his right to present a full defense to the charges against him.

²¹⁷ RP 452, 542.

c. *The prosecutor committed misconduct by vouching for J.R.'s credibility in closing argument based on facts not in evidence.*

A defendant has a fundamental right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution.²¹⁸ “[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime is given a fair trial.”²¹⁹

Prosecutorial misconduct can deprive a defendant of this constitutional right.²²⁰ A conviction must be reversed if there is a substantial likelihood that prosecutorial misconduct affected the verdict.²²¹

To prevail on a prosecutorial misconduct claim, a defendant must prove that the prosecutor's conduct was both improper and prejudicial.²²² Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict.²²³

If the defendant did not object at trial, as is the case here, the defendant is deemed to have waived any error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the

²¹⁸ *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012).

²¹⁹ *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969).

²²⁰ *Glasmann*, 175 Wn.2d at 703–04, 449 P.2d 692.

²²¹ *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied* 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

²²² *Glasmann*, 175 Wn.2d at 704, 449 P.2d 692.

²²³ *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

resulting prejudice.²²⁴

“In the context of closing arguments, the prosecuting attorney has ‘wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.’”²²⁵ “We review the prosecutor's comments during closing argument in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.”²²⁶

A prosecutor commits misconduct by personally vouching for a witness's credibility or veracity.²²⁷ “Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony.”²²⁸

Prosecutors have “wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.”²²⁹ Typically, closing arguments made by prosecutors do not constitute improper vouching for witness credibility unless it is clear that the prosecutor is not arguing an

²²⁴ *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012).

²²⁵ *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)).

²²⁶ *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

²²⁷ *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

²²⁸ *Ish*, 170 Wn.2d at 196, 241 P.3d 389.

²²⁹ *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

inference from the evidence but, instead, is expressing a personal opinion about witness credibility.²³⁰

During closing argument, the prosecutor first highlighted the fact that J.R. had ADHD, autism, and was developmentally disabled.²³¹ The prosecutor continued, referring to Mr. Reed's defense that J.R. made up the allegations of abuse:

[E]ven though he's 12 years old at the time this happened, he's more like maybe an eight-year-old or something like that range maturity-level-wise...That doesn't make him somehow more likely to concoct something like that. If anything, it makes it less likely because he doesn't have the sophisticated thought to come up with that type of a plan that sort of is. So with is [sic] disability, a master plan...it's just not going to happen with him.

And the other part is when a child is young or at a young level, they say things straight out, it's like the child who sees the person at the grocery store and says something you wish they hadn't said if you've had a young child like someone is wearing something funny or why is that person doing that.

At his lower maturity level, it's similar. He's going to be just speaking things straight out.²³²

The prosecutor's argument is clear- J.R. is a credible witness because his mental handicap makes him honest like a small child is honest since J.R.'s developmental age is around eight years old. This was clearly

²³⁰ *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009).

²³¹ RP 583.

²³² RP 583-584.

vouching for J.R.'s credibility. Further, these statements were not based on the facts introduced into the record. There was no expert testimony establishing exactly what J.R.'s developmental age was. Further, there was no testimony establishing that eight-year-olds are inherently honest and to be believed.

The prosecutor committed misconduct by vouching for J.R.'s credibility base on facts not in the record. This misconduct was flagrant and ill-intentioned. The prosecutor was fully aware of what evidence had or had not been introduced at trial and was also aware of the central importance of J.R.'s testimony to the State's case. This misconduct deprived Mr. Reed of a fair trial.

d. It was ineffective assistance of Mr. Reed's trial counsel to fail to object tot he prosecutor's closing argument.

Where a defendant bases his or her ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection likely would have succeeded.²³³

Reviewing courts view the decisions whether and when to object as "classic example[s] of trial tactics."²³⁴ "Only in egregious circumstances, on testimony central to the State's case, will the failure to

²³³ *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

²³⁴ *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989).

object constitute incompetence of counsel justifying reversal.”²³⁵ It is a legitimate trial tactic to forego an objection in circumstances where counsel wishes to avoid highlighting certain evidence.²³⁶

As discussed above, the prosecutor’s closing argument in this case was clearly objectionable and improper hearsay and had trial counsel for Mr. Reed objected to it the objection would have been sustained. The prosecutor’s improper argument in this case is one of those “egregious circumstances on testimony central to the State’s case” where the failure of trial counsel to object to the improper vouching for the credibility of the State’s key witness justifies reversal. Again, J.R. was the primary and most-important source of all incriminating evidence in this case. J.R.’s credibility was the main issue the jury had to determine. Trial counsel for Mr. Reed should have immediately objected to the prosecutor’s improper closing argument that vouched for J.R.’s credibility on facts not in the record. Failure of Mr. Reed’s trial counsel to object to the clear and flagrant improper argument was ineffective assistance of counsel that deprived Mr. Reed of a fair trial.

2. Cumulative error deprived Mr. Reed of a fair trial.

Under the cumulative error doctrine, a defendant's conviction may

²³⁵ *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (*quoting Madison*, 53 Wn. App. at 763).

²³⁶ *Davis*, 152 Wn.2d at 714.

be reversed when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless.²³⁷

Should this court find that none of the errors discussed above constitute sufficient error standing alone to warrant reversal and remand for a new trial, this court should find that the prejudice to Mr. Reed caused by the combined effect of his ineffective trial counsel and the misconduct of the prosecutor combined to effectively deny Mr. Reed a fair trial. Mr. Reed was unable to fully challenge the credibility of the State's main witness and his trial counsel failed to object to baseless vouching for the credibility of the State's main witness by the prosecutor. This court should vacate Mr. Reed's convictions and remand for a new trial.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Reed's convictions and remand his case for a new trial.

DATED this 16th day of December, 2016.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

²³⁷ *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

CERTIFICATE OF SERVICE

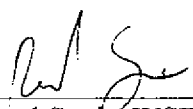
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 16th day of December, 2016, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Eric H Bentson
Cowlitz County Prosecutor's Office
312 SW 1st Ave Rm 105
Hall Of Justice
Kelso WA 98626-1799

And to:

Robert Richard Reed
DOC#962347
Coyote Ridge Corrections Center
P.O. Box 769
Connell WA 99326

Signed at Tacoma, Washington this 16th day of December, 2016.



Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

December 16, 2016 - 11:26 AM

Transmittal Letter

Document Uploaded: 7-491648-Appellant's Brief.pdf

Case Name: State v. Reed

Court of Appeals Case Number: 49164-8

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Reed M Speir - Email: reedspeirlaw@seanet.com

A copy of this document has been emailed to the following addresses:

wallaceA@co.cowlitz.wa.us

bentsone@co.cowlitz.wa.us